

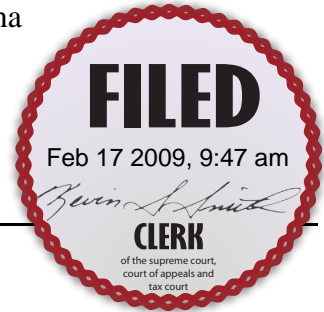
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**IN THE
COURT OF APPEALS OF INDIANA**

RANDYL A. McCAULEY and
DEANNA R. McCAULEY,

Appellants-Defendants,

VS.

DALE W. DuKATE,¹

Appellee-Plaintiff

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No. 28A04-0804-CV-195

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable David Holt, Judge
Cause No. 28D01-0611-PL-484

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

¹ Dale’s last name is spelled “DeKate” in many parts of the record on appeal (including DuKate’s own complaint) and in the McCauleys’ Appellants’ Brief, but he clarified at trial that it is spelled “DuKate.” (Transcript p. 153). We direct the clerk of this court to amend the case docket accordingly.

STATEMENT OF THE CASE

Appellants-Defendants, Randyl A. McCauley (Randyl) and Deanna R. McCauley (Deanna) (collectively, the McCauleys), appeal the trial court's order permanently enjoining them from entering onto an easement over the property of Appellee-Plaintiff, Dale W. DuKate (DuKate), and requiring them to remove a water line and meter from DuKate's property. DuKate cross-appeals the trial court's judgment in favor of the McCauleys on his claim for trespass.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

The McCauleys present two issues for our review, which we restate as:

- (1) Whether the trial court erred in permanently enjoining them from entering onto the easement over DuKate's property; and
- (2) Whether the trial court abused its discretion by ordering them to remove the water line and meter from DuKate's property.

DuKate raises a single issue on cross-appeal, which we restate as:

- (3) Whether the trial court erred by ruling in favor of the McCauleys on DuKate's trespass claim.

FACTS AND PROCEDURAL HISTORY

In 2002, DuKate acquired a 19.92-acre tract of land in Greene County, Indiana. In 2004, DuKate began building a home on the land. Thereafter, DuKate entered into an oral contract to convey approximately 3.5 acres at the southwest corner of his tract to the

McCauleys. In exchange, the McCauleys agreed to pay to have electrical transmission lines extended to the land.

On August 2, 2005, DuKate executed a quitclaim deed conveying 3.58 acres to the McCauleys. The 3.58-acre tract was described in Exhibit A to the deed, and the deed stated that the conveyance was “[s]ubject to any and all easements, right of ways, reservations of record, see attached ‘Exhibit B’.” (Appellant’s App. p. 92). Exhibit B to the deed described a 0.09-acre ingress-egress and utility easement over DuKate’s remaining property.²

Eventually, the relationship between DuKate and the McCauleys began to deteriorate. In part, DuKate claimed that the McCauleys had promised to extend electricity all the way to DuKate’s building site, while Randyl McCauley maintained that he only offered to bring power to his property, leaving DuKate responsible for extending the power north to the site of his home. There were also disputes about parking and allegations of trespassing and stealing firewood.

On November 16, 2006, DuKate filed a complaint against the McCauleys, which consisted of the following four counts: Count I, breach of contract, alleging that the McCauleys had promised to pay the cost of extending an electrical transmission line to the building site on DuKate’s property but had failed to do so; Count II, trespass, alleging that the McCauleys had gone onto DuKate’s property on several occasions without permission, including the installation of a water line and meter; Count III, conversion, alleging that the

² Readers already wondering how a tract of land can be granted “subject to” an easement over a separate tract of land are right to be suspicious. We address the flaw in that wording in Part I of the Discussion and Decision section, below.

McCauleys had taken twenty ricks of firewood³ from DuKate's property; and Count IV, injunctive relief, seeking a permanent injunction against the McCauleys enjoining them from "entering upon the property of [DuKate] or from interfering with [DuKate's] use of the parties' joint easement for ingress and egress and to not maintain a water line on [DuKate's] property." (Appellant's App. p. 10).

A bench trial was held on DuKate's complaint on July 26 and September 11, 2007. On December 5, 2007, the trial court issued its Judgment and Injunction. The trial court entered judgment for the McCauleys and against DuKate on Counts I-III of DuKate's complaint. However, the trial court found in favor of DuKate on Count IV, ordering:

[The McCauleys], their agents, servants, employees, attorneys and all persons in active concert and participation with them, are **RESTRAINED AND ENJOINED** from entering [DuKate's] real estate described on Exhibit A attached hereto, and they are further restrained and enjoined from parking vehicles on such real estate, or in any way inhibiting access to, or use of, [DuKate's] real estate. Further, [the McCauleys] are **ORDERED** to remove and relocate, by June 30, 2008, the water line and water meter that presently is located on, and encroaches upon, [DuKate's] real estate.

(Appellant's App. p. 4). Exhibit A described DuKate's 19.92 acres, "EXCEPTING THEREFROM" the McCauleys' 3.58 acres. The McCauleys filed a motion to correct error and a motion to reconsider, both of which the trial court denied.

The McCauleys now appeal, and DuKate cross-appeals. Additional facts will be provided as necessary.

³ A "rick" is a unit of firewood that is "four feet high by eight feet long and is as wide as the individual firewood pieces, but averages 16 inches wide." <http://www.woodheat.org/firewood/cord.htm> (last accessed on December 4, 2008).

DISCUSSION AND DECISION

On appeal, the McCauleys argue that the trial court erred by permanently enjoining them from entering onto the easement described in the quitclaim deed and by ordering them to remove the water line and meter from DuKate's property. DuKate cross-appeals, contending that the trial court erred by finding in favor of the McCauleys on his claim of trespass.

I. Easement

The McCauleys first assert that the trial court erred by permanently enjoining them from entering onto the easement described in the quitclaim deed. Our supreme court has said that, ordinarily, the granting or denying of an injunction is a matter left to the sound discretion of the trial court. *Kosciusko County Bd. of Zoning Appeals v. Wygant*, 644 N.E.2d 112, 114 (Ind. 1994). However, where, as here, the granting of an injunction turns on a question of law—such as the interpretation of a written contract—our review is *de novo*. See *Oxford Financial Group, Ltd. V. Evans*, 795 N.E.2d 1135, 1141-42 (Ind. Ct. App. 2003).⁴

At first glance, the deed seems clear and unambiguous. The McCauleys were being granted a 3.58-acre tract of land, “[s]ubject to any and all easements, right of ways, reservations of record,” including the 0.09-acre ingress-egress and utility easement described in Exhibit B to the deed. (Appellant's App. p. 92). However, a closer look at the written descriptions of the 3.58-acre tract and the 0.09-acre easement reveals a conflict within the

⁴ In his brief, DuKate states, “This Court will reverse only if the court's findings are clearly erroneous.” (Appellee's Br. p. 6). That standard applies when a trial court makes findings. Here, the trial court's judgment was not accompanied by any written findings.

deed: the easement is adjacent to, not part of, the 3.58-acre tract. The 3.58-acre tract and the 0.09-acre easement are essentially side-by-side rectangles, with part of the eastern edge of the 3.58-acre tract forming the western edge of the smaller 0.09-acre easement. More specifically, the *eastern* boundary of the 3.58-acre tract and the *western* boundary of the 0.09-acre easement are both 1198.83 feet east of something called “Harrison Monument.” (See Appellants’ App. pp. 93-94). A conveyance of land cannot be “subject to” an easement that is separate from the land being conveyed. So, did DuKate actually intend to grant the McCauleys an easement over his land for the benefit of the McCauleys’ 3.58-acre tract, or was the description of the easement in the deed mere surplusage that had nothing to do with DuKate’s conveyance to the McCauleys? For several reasons, we conclude the former.

First, “no part of a contract should be treated as surplusage if it can be given a meaning reasonably consistent with the other parts of the contract.” *Woodruff v. Wilson Oil Co.*, 178 Ind. App. 428, 431, 382 N.E.2d 1009, 1011 (1978). If we do not construe the deed to grant the easement in favor of the McCauleys, then the description of the easement will be rendered surplusage.

Second, where the language of a deed is ambiguous, we may resort to extrinsic evidence to ascertain the intent of the parties. See *Kopetsky v. Crews*, 838 N.E.2d 1118, 1124 (Ind. Ct. App. 2005). Here, the extrinsic evidence weighs heavily in favor of the McCauleys. Most telling is DuKate’s own complaint. In Count I, DuKate stated that he conveyed to the McCauleys the 3.58-acre tract and “ALSO” the 0.09-acre easement. (Appellants’ App. p. 6-7). In Count II, DuKate alleged that “the Defendants [the McCauleys] park vehicles on the

joint easement for ingress and egress of the parties, which parking blocks the Plaintiff's [DuKate's] use of the easement.” (Appellants’ App. p. 8) (emphasis added). Finally, in Count IV, DuKate twice mentions the “mutual easement for ingress and egress” before asking for a permanent injunction enjoining the McCauleys from interfering with his use of “*the parties’ joint easement* for ingress and egress[.]” (Appellants’ App. pp. 9-10) (emphasis added). All of these passages support a finding that DuKate knew that he had granted the McCauleys an easement over his property.

Moreover, a survey of the land shows that the easement described in the deed abuts the McCauleys’ tract, passes over DuKate’s tract, and provides access to a county road. (Appellants’ App. p. 96). Reviewing the survey in conjunction with the deed, only one reasonable conclusion can be reached: DuKate intended to grant the easement to the McCauleys so that they can reach the county road. Tellingly, DuKate does not offer any alternative explanation for why the 0.09-acre easement was included in the deed.

In sum, we hold that the parties intended for the McCauleys to have a 0.09-acre easement over DuKate’s land. Therefore, the trial court erred in permanently enjoining the McCauleys from entering onto the easement. We must remand this cause to the trial court with instructions to amend its order accordingly.⁵

⁵ We reject DuKate’s argument that the trial court properly enjoined the McCauleys from entering onto the easement because the McCauleys, DuKate claims, have separate access to the county road and therefore do not need the easement. Even if that is true (the McCauleys argue that it is not), DuKate cites no authority for the proposition that an express easement must be necessary in order to be valid and enforceable. On a related note, because we conclude that the McCauleys have an express easement, we need not address their claim for an easement by necessity.

II. *Water Line and Meter*

The McCauleys also contend that the trial court erred in ordering them to remove the water line and meter they had installed on DuKate's property. This issue, unlike deed interpretation, does not present a pure question of law, so we apply the general standard applicable to the issuance of a permanent injunction: abuse of discretion. *See Wygant*, 644 N.E.2d at 114.

At first glance, it appears as though the McCauleys are correct. The installation of the water line and meter was part of DuKate's trespass claim (Count II of DuKate's complaint), and the trial court ruled in favor of the McCauleys and against DuKate on that claim. If the McCauleys' installation of the water line and meter on DuKate's property did not constitute trespass, then it is inconsistent to require the McCauleys to remove them. As DuKate himself puts it, "the [trial] court's ruling requiring the [McCauleys] to remove the waterline makes no legal sense without a finding of trespass." (Appellee's Br. p. 12). This is where part of DuKate's cross-appeal comes into play.⁶ DuKate argues that the trial court erred in ruling in favor of the McCauleys on his trespass claim. Therefore, before ruling on the McCauleys' second argument, we must turn to this portion of DuKate's cross-appeal.

A plaintiff in a trespass action must prove that he was in possession of the land and that the defendant entered the land without right. *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999), *reh'g denied*. If the plaintiff proves both elements, he is entitled to nominal damages without proof of injury. *Id.* Here, there is no dispute that the

⁶ DuKate alleged other acts of trespass in his complaint, and he cross-appeals based on those acts as well. We will address those arguments in Part III, below.

McCauleys installed the water line and meter on DuKate's land. The only question is whether, in doing so, the McCauleys entered DuKate's land "without right." The parties agree that, because the trial court did not issue findings, DuKate is appealing from a general judgment. When reviewing a general judgment, we will neither reweigh the evidence nor judge the credibility of witnesses. *Beiger Heritage Corp. v. Montandon*, 691 N.E.2d 1334, 1336 (Ind. Ct. App. 1998). Rather, we will consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom. *Id.*

DuKate testified at trial that he never gave the McCauleys permission to put the water line and meter on his property. (*See* Tr. pp. 264-65). This would seem to support DuKate's cross-appeal. However, the McCauleys direct us to testimony tending to show that DuKate did, in fact, give them permission to install the water line and meter on his land. Randy testified that the water line was put on DuKate's property "by [DuKate's] permission." (Tr. p. 181). Moreover, the meter that the McCauleys had installed is a dual meter, suggesting that it is meant to serve both properties. This inference is supported by Randy's testimony that he placed the water meter on DuKate's property instead of his own "[b]ecause if I set the meter on my property [DuKate] would have had a harder time hooking up to it and running with it. I set it up for him." (Tr. p. 181). Finally, Deanna testified that DuKate and his wife used the water, thereby benefitting from the McCauleys installation of the water line and meter. All of this evidence tends to prove that the McCauleys had DuKate's permission to install the water line and meter on DuKate's property. As such, DuKate's reference to his own self-serving testimony is an invitation for us to reweigh the evidence, which we will not

do. We affirm the trial court's judgment in favor of the McCauleys on the portion of DuKate's trespass claim relating to the water line and meter.

This conclusion disposes of DuKate's argument that the trial court properly ordered the McCauleys to remove the water line and meter. Generally, a court must consider four criteria in deciding whether to grant a permanent injunction: (1) whether the plaintiff succeeded on the merits; (2) whether the plaintiff has an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; and (4) whether the granting of the injunction will harm the public interest. *See Plummer v. American Inst. of Certified Pub. Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). However, as DuKate notes, when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor. *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*, 751 N.E.2d 702, 713 (Ind. Ct. App. 2001). DuKate asserts that we need not address the harms or balance of harms because the McCauleys' installation of the water line and meter was unlawful. Having rejected this argument above, we do the same here.

This conclusion is also dispositive of the first of the four injunctive relief elements: DuKate did not succeed on the merits with regard to the water line and meter. The second and third criteria also weigh against DuKate: other than his interest in the "exclusive ownership" of his land, DuKate can point to no other harm that he is suffering or will suffer as a result of the placement of the water line and meter. (Appellee's Br. p. 9). In fact, as

discussed above, there was testimony at trial that DuKate has benefitted from the installation of the water line. The McCauleys, on the other hand, will suffer harm if they are required to pay the cost of removing the water line and meter. Neither party makes any claim with regard to the public interest. Having considered the four factors, and having affirmed the trial court's conclusion that the McCauleys' installation of the water line and meter did not constitute trespass, we hold that the trial court abused its discretion in ordering the McCauleys to remove the line and meter. On remand, the trial court must amend its order accordingly.

III. *DuKate's Other Claims of Trespass*

In addition to his claim that the McCauleys committed trespass by installing the water line and meter on his property, which we rejected above, DuKate argues that the trial court should have found several other acts of trespass. In one summary paragraph, DuKate directs us to several pages of the transcript containing testimony that the McCauleys (1) removed and moved tree stumps on DuKate's land in order to bury a cable, (2) dug a hole on DuKate's property to burn stumps and construction materials, (3) reshaped DuKate's land with bulldozers, (4) allowed cars to park on DuKate's property, (5) removed "No Parking" signs from DuKate's property, (6) removed fencing from DuKate's property, and (7) buried cable on DuKate's property, all without DuKate's permission. None of these allegations is well-developed, and the McCauleys respond that DuKate never complained of any alleged trespass until a personal feud flared up regarding the firing of guns in the area. For example, both Randy and Deanna testified that DuKate and the McCauleys burned construction

materials together on DuKate's property. DuKate makes no effort at all to further develop these additional trespass claims in his reply brief, focusing instead on the water line and meter. Without a more convincing showing by DuKate, we decline to disturb the trial court's judgment on the trespass claim.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred in permanently enjoining the McCauleys from entering onto the easement described in the quitclaim deed and by ordering them to remove the water line and meter from DuKate's property. We remand this cause to the trial court with instructions to amend its order accordingly. However, we affirm the trial court's judgment in favor of the McCauleys on DuKate's claim of trespass.

Affirmed in part, reversed in part, and remanded with instructions.

BRADFORD, J., concurs.

BAILEY, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

RANDYL A. McCAULEY and)	
DEANNA R. McCAULEY,)	
)	
Appellants-Defendants,)	
)	
vs.)	No. 28A04-0804-CV-195
)	
DALE W. DuKATE,)	
)	
Appellee-Plaintiff.)	

BAILEY, Judge, concurring in part and dissenting in part

I concur in Parts I and III of the majority’s opinion. However, I dissent from the majority’s conclusion in Part II.

As the majority notes, in considering an injunction, “[w]e do not review the trial court’s exercise of discretion but only the alleged abuse of that power.” Wygant, 644 N.E.2d at 112. We affirm a general judgment “if sustainable upon any theory consistent with the evidence.” Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008).

A mandatory injunction is an extraordinary equitable remedy which should be granted with caution. The plaintiff carries the burden of demonstrating injury which is certain and irreparable if the injunction is denied. In making its decision the trial court must weigh whether the plaintiff has an adequate remedy at law and the court must consider whether an injunction is in the public interest.

Dible v. City of Lafayette, 713 N.E.2d 269, 272 (Ind. 1999) (quoting Campbell v. Spade, 617 N.E.2d 580, 583 (Ind. Ct. App. 1993)).

The majority is correct to identify what may appear to be an inconsistency in the trial court's denying DuKate's claim for trespass, while ordering the McCauleys to remove the water line and meter. In fact, the trial court's conclusions were not incompatible.

DuKate alleged that the McCauleys "installed a water line which runs directly across" his property. Appendix at 8. Without proof of injury, a plaintiff is entitled to nominal damages for trespass. Runge, 717 N.E.2d at 227. Here, however, there was evidence, namely Deanna's testimony, that DuKate actually derived some benefit from placement of the water line. (Appellant's App. pp. 72-73). Thus, the trial court may have found that the McCauleys entered by right; alternatively, it may have found that any nominal damage was offset by DuKate's receipt of water through the line. Given the trial court's general judgment, we do not know which of these alternatives the trial court found in entering judgment for the McCauleys.

Meanwhile, as injunctive relief, the trial court ordered the McCauleys to remove the water line. DuKate alleged that the McCauleys "will continue to violate the rights of the Plaintiff unless the court enters an order specifically enjoining the Defendants from entering upon the property of the Plaintiff or . . . from maintaining a water line." (Appellant's App. pp. 9-10).

In essence, the majority concludes that the defense judgment on trespass equates to failure on the merits, and therefore, the absence of any threatened injury to DuKate and the lack of any need for an adequate legal remedy.

The second and third criteria [of the permanent injunction analysis] also weigh against DuKate: other than his interest in the “exclusive ownership” of his land, DuKate can point to no other harm that he is suffering or will suffer as a result of the placement of the water line and meter.

(Slip op. at 10 (citing Appellee’s Brief at 9)).

First, I am disappointed by the majority’s belittling treatment of fee simple. “Exclusive ownership,” or fee simple absolute, is “the broadest property interest allowed by law.” BLACK’S LAW DICTIONARY 630 (7th ed. 1999). Second, a defense judgment for money damages does not preclude injunctive relief.

Although the allocation and evaluation of monetary damages may prove to be unquantifiable, proof of some unknown but material additional cost incurred by the plaintiff is sufficient for injunctive relief. Injunctive relief is not as speculative as monetary damages and does not involve the apportionment problems that come with a reward of monetary damages. Even if the City ultimately fails to establish its action for damages, an equitable action for injunctive relief may still lie. This is simply an application of the widely accepted doctrine that injunctive relief is available when a party suffers economic harm that cannot necessarily be quantified.

City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1246-47 (Ind. 2003) (citations omitted).

The parties agree that the water line is on DuKate’s property. DuKate testified that he did not give the McCauleys permission to place it there. (Appellant’s App. pp. 75-76). Beyond this, we must take into account the deep enmity between the neighbors. As DuKate testified regarding one occasion,

A: He starts cussin' me. Tellin' me to F off. . . . And then he pulled the gun out on me.

Q: Did he point it at you?

A: Yes sir, he did.

Q: And then what happened?

A: He jostled around and then he tossed the gun to his daughter who was standin' beside him.

. . .

[H]is wife was over there with a camera.

Q: What happened?

A: I was on my property. OK, I did not go onto his property and Mr. McCauley threw the gun to his daughter and then he picks up a brick in his hand. A red clay brick and dares me to come over there.

Q: And what do you do?

A: I just told him, I left. I told 'em I was gonna go find out who took my fence down. His wife come runnin' out yellin' at my wife . . .

(Tr. p. 42). Randy¹ confirmed that personal problems developed between the two families.

He testified that the DuKates

gave permission to one of their friends to shoot guns out in front of my house, out in the field and I didn't appreciate it. My wife and them didn't know 'em, they pulled up while they were shootin', scared my wife and my daughter to death.

(Tr. p. 169). Indeed, the majority recognizes that a "personal feud" developed between the parties. (Slip op. at 11).

Allowing the McCauleys to enter onto DuKate's land to maintain the water line would entangle these estranged neighbors for years to come. The trial court was explicit that the

McCauleys and everyone associated with them were “restrained and enjoined from entering” DuKate’s property. (Appellant’s App. p. 4). The trial court clearly felt it necessary to separate the parties, to the degree possible.

As to the adequacy of DuKate’s remedies at law, it would be impossible to quantify the future damages or the frustration of having to allow an estranged neighbor onto one’s own property. See SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority, 831 N.E.2d 725, 728-29 (Ind. 2005) (holding suit about whether land could be used as an airport was an equitable action), cert. denied, 546 U.S. 1093 (2006), reh’g denied, 546 U.S. 1226 (2006). Therefore, DuKate did not have an adequate legal remedy. Regarding the merits, although the deed explicitly addressed the easement, it did not reference the water line. Meanwhile, the parties’ testimony was in direct conflict on this point. Weighing the respective harms, the McCauleys would bear the cost of removing the line and replacing it somewhere else. DuKate, however, would face allowing onto his land someone with whom he had stern disagreements. The public interest is best served by separating the feuding parties.

Based upon this reasoning, I conclude that the trial court’s grant of injunctive relief was intended to separate the feuding parties, to the degree possible, and therefore was not an abuse of its discretion. “[T]he foundation of the social pact is property, and its first condition that everyone be maintained in the peaceful enjoyment of what belongs to him.” JEAN-JACQUES ROUSSEAU, A DISCOURSE ON POLITICAL ECONOMY (1755), reprinted in ROUSSEAU:

THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS, at 29-30 (Victor Gourevitch ed., Cambridge University Press 1997).

I would affirm the trial court's order requiring the McCauleys to remove the water line and meter.